UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HARLEY DAVIDSON MOTOR COMPANY

and **Case 5-CA-183791**

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, TYSON LODGE 175, DISTRICT 98

Andrea Vaughn and Patrick J. Cullen, Esqs.,
for the General Counsel.
Brian F. Jackson, Esq., (McNees, Wallace & Nurick, LLC, Harrisburg, Pennsylvania)
for the Respondent.
Nancy B.G. Lassen, Esq., (Willig, Williams & Davidson, Philadelphia, Pennsylvania)
for the Charging Party.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried in Baltimore, Maryland on May 3, 2017. The IAM Lodge 175 filed the charge on September 7, 2016 The General Counsel issued the complaint on December 21, 2016.

On August 29, 2016, Respondent informed the Charging Party Union that it was going to lay-off 102 bargaining unit employees in the fall of 2016. It also informed the Union on August 29, at least orally, that it was going to offer a $15,000 incentive to certain unit employees if they would retire voluntarily. The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act in failing to afford the Union an opportunity to bargain with respect to the incentive plan. The General Counsel is not alleging that Respondent violated the Act in failing to provide an opportunity to bargain over the lay-off. Also, contrary to the suggestion in footnote 4 of the General Counsel's brief, he did not allege a violation for a failure to engage in bargaining over the effects of the lay-off.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, manufactures motorcycles at several facilities in the United States, including York, Pennsylvania. Respondent sold and shipped goods valued in excess of $50,000 directly to points outside of Pennsylvania from the York plant in the year ending on November 30, 2016. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union. IAM Lodge 175, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Charging Party Union has represented production and maintenance employees at Respondent's York, Pennsylvania facility for many years. As of May 2017, the bargaining unit consisted of about 1000 employees. Most of these are regular full-time employees, others are long-term casual employees, but some are short-terms casual employees.

Respondent has a 2 tier compensation system. Employees hired prior to February 2010 are generally compensated better than those hired afterwards. The parties had a collective bargaining agreement that ran from 2010-2017. In 2015 Respondent initiated early contract negotiations which resulted in a new agreement with a term from February 1, 2016 to October 15, 2022. The new contract generally increased the compensation of unit employees. However, during the contact negotiations in late 2015, Respondent informed the Union that production of its "soft tail" model motorcycle would be moved from York to its Kansas City plant in 2017 and this would result in the loss of about 30% of the unit jobs at York.

On August 29, 2016, Michael Fisher, the General Manager at the York plant, went to the office of the local union, which is located next to his office. Local Union President Brian Zarilla was not at work that day. Fisher spoke to Kermit Forbes, the union's vice president, and David Staub, the union's chief steward. Fisher told Forbes about an incentive plan the company would be offering to employees who chose to resign voluntarily. This plan was being offered in conjunction with Respondent's plan to lay-off 102 employees from the York plant in the fall of 2016. There is a dispute as to whether the Union was advised of the lay-off prior to August 29.[1] I need not resolve that dispute since the issue in this case only concerns the incentive plan; not the lay-off.

[1] The record establishes that Respondent at least hinted to the Union that there might be lay-offs in 2016 prior to August 29. Fisher, for example, told the Union that Harley's motorcycle sales were not what the company had projected they would be.

Moreover, the Union did not request bargaining over the fall 2016 lay-off. Furthermore, the record establishes that Respondent could have instituted the lay-off without offering any incentives, and without bargaining over the size or timing of a layoff, G.C. Exh. – 6 (set forth below), Tr. 74-76.[2]

Fisher told Forbes and Staub that Respondent would be offering those employees who would be laid off a one-time $15,000 incentive to resign, Tr. 71, 221. He also told them that the company would hold "town hall" meetings for all employees on August 31 to discuss the lay-offs and the incentive plan. Further, Fisher announced that Respondent would be slowing down the assembly line so that one motorcycle would be assembled in 90 seconds, rather than in 75 seconds. Forbes immediately called Union President Zarilla and recounted his conversation with Fisher.

The details of the incentive plan are set forth in a proposed Memorandum of Understanding (MOU), G.C. Exh. – 4. Mike Fisher testified that he gave a copy of this MOU to Forbes on August 29. Union officials deny this and state that they did not see the MOU until Thursday, September 1. The MOU provides that the incentive payment of $15,000 will be available to regular Tier 1 employees impacted by the lay-off. It also provides that employees volunteering for termination must do so by noon on September 16 to receive the incentive payment.

Union President Zarilla met with Fisher at the York plant on Tuesday, August 30. His testimony indicates that regardless of whether the Union had a copy of the MOU, it was familiar with the details of the incentive plan.

> The conversation was pretty, pretty heated because, first of all, we didn't agree with the incentive package that they were throwing out there because we didn't get a chance to negotiate any kind of package. We didn't agree that it should only be offered to certain employees in the factory. We didn't agree that 102 people should be laid off. We didn't agree that the line rate changes should go down by 75 units a day. So we let him know that we didn't agree with it, and we weren't happy with it, and we didn't get a chance to bargain it.

Tr. 31.

[2] It is unfortunate that the record does not contain the contractual clauses pertaining to management's rights with respect to lay-offs (e.g., Article 8 of the current collective bargaining agreement). However, the record establishes that the Union had waived its rights to bargain over the fall 2016 lay-off, Tr. 75-76; G.C. Exh. 6.

Fisher also told Zarilla that Respondent would hold "town hall" meetings with employees on Wednesday, August 31 to discuss the lay-off and the incentive plan.

Fisher conducted 6 separate meetings on the 31st. In these meetings he read from a power point presentation, G.C. Exh. 2. The power point contains specific information on the number of lay-offs and the change in the speed of the assembly line. However, with regard to the incentive plan, it only indicates that there will be a lump sum payout-without indicating the amount of the payout.

On Thursday, September 1, 2016, Theresa Kwayi, the human resources director at York, emailed the Union documents setting forth the specifics of the incentive plan. This included the amount of the one-time payment ($15,000), the date by which eligible employees must make an irrevocable decision to terminate in order to receive the incentive (between September 6 and September 16 at noon) and that employees who accepted the incentive would be give 2 weeks notice between October 10 and November 30, 2016 regarding their last day of employment.[3]

It is unclear whether the Union was apprised of when the "open season" for employees to accept the incentive would occur, prior to September 1. Also, General Manager Mike Fisher did not know the timing of the fall 2016 lay-offs until that date.

On Friday, September 2, Zarilla sent a letter to Kyle Johansen, Respondent's director of business services and labor relations, demanding bargaining over the incentive program. Johansen works at corporate headquarters in Milwaukee. Zarilla also sent the letter to Johansen as an attachment to an email. Johansen responded via email the same day stating that he was willing to discuss the bargaining demand.

Johansen and Zarilla had a telephone conversation on the morning of Tuesday, September 6 (the day after Labor Day). Johansen followed up that conversation with an email stating that $15,000 was all the company was willing to offer as an incentive for voluntary resignation. He continued:

> As we discussed the Company prefers to continue the process of seeking volunteers for the incentive and allowing employees to choose whether or not to sign up for it. At the same time, the Company does not want a confrontation with the union over the incentive. To that end, we are seeking permission from the union to proceed with the current voluntary incentive we have offered. **However, if the union does not want the Company to proceed, we will withdraw the voluntary incentive offer, cancel the current process underway and implement the layoffs as required under the CBA.** (Emphasis added)
>
> Please let me know the union's position by the close of business today. If I don't hear from you, I will assume the union has granted permission for the Company to continue the voluntary separation incentive process currently underway.

[3] Zarilla testified that he had seen documents explaining the plan before September 1, but did not say when he saw it, Tr. 39-40.

G.C. Exh. 6.

I conclude that the Union's silence constitutes an acknowledgement that Respondent was entitled to implement the lay-off however it wished—without providing an opportunity to bargain over the details of the lay-off, including whether or not to offer any incentive.

On September 7, the Union filed the charge giving rise to this case.

On September 15, the parties exchanged emails. Zarilla stated that the Union did not accept an incentive plan that did not cover all members of the local. Further, he wrote, "if that means that you are going to pull the incentive plan then you do what you need to do."

Seven eligible employees accepted the incentive to terminate their employment. Afterwards, on September 21, 2016, the Union suggested changes to the incentive plan such as offering $30,000 to 61 employees instead of $15,000 to 102, or reducing the age at which employees would be eligible for a full pension.[4] Respondent rejected these suggestions.

The Union and company discussed the incentive plan over the telephone on September 21. Zarilla asked Kyle Johansen to come to York to negotiate with regard to the incentive plan, face to face. Johansen declined. Zarilla asked if the incentive plan was open for negotiation. Johansen responded that the plan was closed.[5]

On September 23, a week after the opportunity to accept the $15,000 incentive expired, the Union requested that Respondent discontinue the offer and rescind it, G.C. Exh. 9. Respondent rejected this request.

Analysis

I am dismissing the complaint in this matter because the Union waived all its bargaining rights with respect to the fall 2016 lay-off. The record, particularly Union President Zarilla's testimony at Tr. 74-76, and G.C. Exh. 6, establish that the Union had given Respondent a carte blanche with regard to this lay-off. The Union and General Counsel do not take issue with the statement in Kyle Johnson's September 6, 2016 email that Respondent had the right to cancel the incentive program and proceed with the lay-offs without it. Instead of responding to Johnson's inquiry, the Union remained silent (other than filing a ULP charge) until September 15 when it appears to have suggested that Respondent should cancel the incentive plan and proceed with the lay-offs without any incentive plan.[6] Of course, by this time, Respondent and some employees had relied on the Union's silence to move forward with the incentive plan.

[4] Respondent had hired a lot of employees in 1988 and 1989 who were only a few years short of the service necessary to receive a full pension.

[5] The record is a little unclear as to what happened on September 21 and 22. Johansen testified that he told Zarilla on September 21 that while Respondent would not revise its pension plan as an incentive, it would take another look at doubling the size of the lump-sum payout. He testified that on September 22, he told Zarilla that Respondent would not double the payout either.

[6] I regard this as another acknowledgement by the Union that Respondent had the right to implement the lay-off without bargaining and without offering any incentive plan.

It is true, as the General Counsel states, that there generally cannot be a waiver of a union's bargaining rights when it is presented with a *fait accompli, Pontiac Osteopathic Hospital,* 336 NLRB 1021 (2001). If Respondent had an obligation to bargain over any aspects of this lay-off, its presentation of the $15,000 incentive would certainly qualify as a *fait accompli*. It was presented to the Union shortly before implementation and was presented as a "take it or leave it" proposition. However, the Union in the instant case had already waived its bargaining rights regarding all terms of the 2016 lay-off prior to August 29, 2016 when it learned of the $15,000 incentive offer. Moreover, its failure to respond to Johansen's September 6 email until September 15 also waived any rights it would have had to bargain over the incentive plan.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. June 27, 2017

Arthur J. Amchan
Administrative Law Judge

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.